Filed 8/18/04 Wells v. Rockwell Automation, Inc. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

PERRY WELLS et al., Plaintiffs and Appellants, v. ROCKWELL AUTOMATION, INC., Defendant and Respondent.	A100944 (San Francisco County Super. Ct. No. 318309)

Appellants Perry and Ruth Wells brought the underlying lawsuit against Allen-Bradley Company, LLC (Allen-Bradley),[1] claiming damages arising out of Perry Wells's exposure to asbestos-containing products during the course of his employment. They appeal from a judgment following jury trial, arguing that no substantial evidence supported the verdict, that the trial court erred in admitting certain testimony, and that they were deprived of a "meaningful" hearing of their motion for new trial. We affirm.

I.

BACKGROUND

Appellant Perry Wells was a Navy electrician and shipyard worker between 1942 and 1984. He and Ruth Wells married in 1964. It is undisputed that he was exposed to asbestos from a variety of sources during the course of his employment. He was diagnosed with lung cancer in 1999.

[1] Rockwell Automation, Inc. is the successor in interest to Allen-Bradley.

Appellants filed the underlying lawsuit against over 40 named defendants. At the time of trial, only Allen-Bradley, a manufacturer of industrial electrical control devices, remained. Allen-Bradley's electrical components contained both plastic and metal parts. Prior to the 1970's, some of those plastic parts contained asbestos.

Mr. Wells testified in May 2001 at his first deposition[2] that he recalled inventorying certain Allen-Bradley products. He also testified that in the course of his 22-year Naval career, he had changed an electrical part known as an "arc chute"[3] about 50 times, and that some of those arc chutes were manufactured by Allen-Bradley. Mr. Wells also recalled removing arc chutes made by other manufacturers, including General Electric, Westinghouse, Cutter Hammer, and Allis Chalmers.

At his second deposition in July 2002, Mr. Wells testified that he had sometimes repaired Allen-Bradley arc chutes by cutting a "V" into them with a knife, filling them with epoxy and sanding them. He testified that this created "quite a bit of dust." Mr. Wells testified that he had no expectation that working with products containing asbestos was "causing [him] permanent lung damage" or would be harmful years later. He considered the electrical materials he worked with to be safe.

Robert Maccani, a former polymer chemist, manager of Allen-Bradley's plastics laboratory and manager of plastics materials and materials technology for Allen-Bradley, testified about Allen-Bradley products. He testified at trial that some of the plastic parts molded by Allen-Bradley contained asbestos, which was almost completely phased out by 1977. Maccani testified that none of the arc chutes used in Allen-Bradley products contained asbestos, and that he had been mistaken when he testified otherwise at his deposition. Maccani explained that asbestos in Allen-Bradley's plastic parts was "confined, contained within [a] polymer matrix." Therefore, Allen-Bradley "believed that the asbestos is totally encapsulated in our compounds and that it would not be

---

[2] Mr. Wells's videotaped deposition testimony was played for the jury.

[3] Mr. Wells testified that an arc chute was "a bonnet which fits over a main contactor to extinguish the arc when the contact opens."

releasing fibers in any of its wear or use in the field." Because "the asbestos was fully contained in our compounds [it] would not release fibers to the air." For that reason, Allen-Bradley products did not contain or display any warnings about asbestos.

Maccani testified that Allen-Bradley did not intend consumers of the products to alter them. "We specifically told people to keep their hands off. We have good designs and we didn't want them to be adapted in any way. We designed generally to close tolerances and any drilling or anything like that would . . . alter the performance of the device." The arc chutes manufactured by Allen-Bradley were designed so that they would not need cleaning or repair and that those actions might "damage [the] integrity of the surfaces that we made the material out of."

Jerome Vogel, a paralegal with Rockwell Automation, Inc. and former tester in the electrical test department of Allen-Bradley, testified that he had "been told that certain Allen-Bradley arc chutes contain asbestos," and had "seen documentation that show certain Allen-Bradley arc chutes do not contain asbestos."

Kenneth Cohen, a retired OSHA inspector and certified industrial hygienist, testified that Mr. Wells could have been exposed to asbestos from the electrical components "if they were asbestos-containing materials that became eroded, they became scratched, in some way brought the asbestos to the surface . . . ." Cohen testified regarding an Allen-Bradley document indicating that a screwdriver tip should be used to remove the magnetic armature from a contactor. Cohen believed that the suggested method could "potentially expos[e] asbestos components." "[S]crewdrivers sometimes slip. And using a screwdriver in that manner to pry it out is one of the ways of eroding the finished surface . . . ." He testified that merely touching a plastic part containing asbestos would not expose the handler to asbestos fibers; there would have to be "[s]ome mechanical disturbance to the plastic." While Cohen was the corporate director of safety and health at a shipyard, he never scraped or scratched electrical components and had no recollection of seeing anyone else do it. He had never seen an electrician "V-out" an arc chute.

The jury returned a special verdict consisting of its answers in the negative to the following two questions: "Was there a defect in design or a failure to warn [of] defect of the products involved as to the defendant" and "Was [the] defendant negligent?" The court entered judgment in favor of Allen-Bradley. Appellants filed a motion for new trial, which was denied by operation of law.

II.

DISCUSSION

A. Testimony of Robert Maccani

Appellants urge that the court erred in allowing certain testimony of Robert Maccani. They claim his testimony "fracture[d] the hearsay rule," and was "completely unsupported scientific opinion evidence."

Though appellants argue that it would be "extremely burdensome to attempt to list" all the portions of Maccani's testimony to which they object, they identify two passages which are "key." First, appellants identify the following portion of Maccani's deposition testimony, which was read into the record at trial:

"Q. And how did [the subject of removing asbestos from the compounds used to mold Allen-Bradley component parts] become a topic of discussion within the organization?

"A. Well, the manufacturers of the molding compounds were concerned because of the limits that were being placed on them for free asbestos in the air, and with the OSHA limits that were being proposed and being decreased they were concerned about their operation. So they ran various studies and concluded that they could generally easily meet the standards, but for a variety of reasons decided that they would best get out of the business. And not use asbestos. They recognized that the primary problem was airborne free asbestos, and once the asbestos is compounded it's encapsulated by the phenolic or polyester or whatever binder, and there's no longer a free asbestos fiber, so it's not a—it's not of concern to a molder such as us. But it was their concern was mostly back up in the system where they were using the free asbestos."

Prior to the reading of the deposition testimony, the court instructed the jury that the testimony was not "being offered for its truth, but solely for the purposes that it was spoken for purposes to be notice."

Appellants also object to the following testimony by Maccani at trial:

"Q: Now, given the process you've just described and given your knowledge of the materials used in these compounds, even in those products that had asbestos in this hard plastic, did you ever suspect or know whether asbestos fibers could be released from the plastic parts of Allen-Bradley products?

"A: No, we believed that there—the asbestos fiber that's been molded into a plastic part is—continues to be coated with the polymer matrix. And any abrasive dust or whatever that comes off is just particulate matter rather than fibrous in nature.

"And there were some studies by some of our supply—manufacturers that showed that even during their operation, which is . . . a step prior to Allen-Bradley receiving the compounds, when they're mixing the asbestos fibers and tolling it in this process I described before, and then grinding it, as it gets ground up, they did test their products or their operations—

"[Appellants' Counsel:] Objection, your honor. This is hearsay. No foundation. Percipient witness.

"[Defense counsel:] Two responses. One, he's offering his understanding of the process; and two, goes to notice as to what Allen-Bradley—

"The Court: All right. This is not going for the truth of the matter but only as to knowledge and notice. You may continue."

Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) In *Hickman v. Arons* (1960) 187 Cal.App.2d 167, defendant was sued for negligence after the plaintiff was killed by a falling wall. The court held that evidence of a notice sent by the city building inspector to defendant regarding the dangerous condition of the wall was admissible "to prove knowledge of the condition of the wall . . . . It was proper to show that appellants had both notice and

warning that the wall was in fact dangerous . . . . For these purposes the notice was not hearsay but was direct evidence." (*Id*. at p. 171.) Likewise here, evidence regarding whether Allen-Bradley had knowledge or was put on notice of any dangers resulting from the asbestos in their products was relevant to appellants' failure to warn and negligence claims. (See *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002.) Maccani's testimony regarding Allen-Bradley's knowledge was relevant and admitted for a purpose other than as evidence of the truth of the matter. Consequently, the testimony was not inadmissible hearsay.

Appellants' claim that the testimony is "unsupported scientific opinion evidence " likewise fails. First, appellants did not object at trial to this portion of Maccani's testimony on the basis that it was "unsupported scientific opinion evidence." Second, Maccani's cited testimony is not an opinion, scientific or otherwise. He was asked, "did you ever suspect or know whether asbestos fibers could be released from the plastic parts of Allen-Bradley products?" Maccani responded in the negative based on "some studies by some of our supply-manufacturers . . . ." His response was not an opinion. Likewise, Maccani's deposition testimony about studies done by manufacturers of molding compounds was not an opinion, but a response to the question "how did [the topic of removing asbestos from compounds used to mold Allen-Bradley parts] become a topic of discussion within the organization?"

Finally, the testimony was admitted subject to a limiting instruction that it was not to be considered for the truth of the matter, but only to show notice and knowledge on the part of Allen-Bradley. Appellants contend that "nobody could understand the trial court's admonitions, because they don't make any sense." To the contrary, the trial court's admonitions were perfectly clear. First, prior to the reading of Mr. Wells's deposition testimony, the court stated: "We're going to hear a part now, which you're not to accept as being offered for its truth, but solely for the purposes that it was spoken for purposes to be notice." Likewise, during Maccani's testimony, the court indicated: "All right. This is not going for the truth of the matter but only as to knowledge and notice. . . . That's not taken for its truth. It's only taken in reference to the knowledge

that his company would have and as reference to notice . . . ." We presume the jury followed the limiting instructions. (See *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 598-599.) The court did not err in admitting this testimony subject to the limiting instruction.

B. Substantial Evidence

Appellants maintain that no substantial evidence supports the jury's verdict. The jury's special verdict consisted of its answers in the negative to the following two questions: "Was there a defect in design or a failure to warn [of] defect of the products involved as to the defendant" and "Was defendant negligent?" Consequently, the court entered judgment in favor of Allen-Bradley.

When a judgment is attacked on the ground that there is no substantial evidence to sustain it, "[o]ur authority begins and ends with the determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences or deductions in the absence of a rule of law specifying the inference to be drawn. We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment. [Citations.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631, italics omitted.) Even uncontradicted testimony in appellant's favor "does not necessarily conclusively establish the pertinent factual matter: The trier of fact is free to reject any witness' uncontradicted testimony; and the court of appeal will affirm so long as the rejection was not arbitrary. [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2002) ¶ 8:54, p. 8-21 (rev. #1 2000), italics omitted.) We view all factual matters in the light most favorable to the prevailing party, resolving all conflicts and indulging all reasonable inferences from the evidence to support the judgment. (*Bickel v. City of Piedmon*t (1997) 16 Cal.4th 1040, 1053,

abrogated by statute on another ground as stated in *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668.)

Appellants argue that the evidence demonstrating that Allen-Bradley's electrical components were defective under the consumer expectation test of design defect was "uncontroverted" and that "the defense presented no evidence whatever to meet the plaintiffs' evidence of design defect." Appellants identify two portions of testimony in support of this claim. First, they note Perry Wells's testimony that "he had no expectation that asbestos-containing electrical parts posed him any danger, or were in any way hazardous or capable of causing deadly cancer decades after their use." Next, they identify the testimony of Kenneth Cohen, a certified industrial hygienist, who they assert testified that "the asbestos fibers released by these products posed substantial risk of disease to Perry Wells when used as intended."

We note at the outset that even assuming this evidence was uncontroverted, it does not lead to the conclusion that no substantial evidence supported the jury's verdict. First, the jury was free to disbelieve the testimony of Mr. Wells and Mr. Cohen as long as the jury's rejection of their testimony was not arbitrary. Moreover, the jury could have found that appellants did not meet their burden of proof in this case.

Also, contrary to appellants' assertion, the evidence here *was* controverted. The issue of whether Allen-Bradley's products were used by Mr. Wells in an expected or intended manner was the subject of conflicting testimony. Mr. Wells testified that he sometimes repaired Allen-Bradley arc chutes by sanding them and cutting a "V" into them with a knife, creating "quite a bit of dust." Cohen testified that, assuming the component contained asbestos, using a screwdriver to remove the magnetic armature from Allen-Bradley contactors in the manner suggested in Allen-Bradley documents could "potentially expose asbestos components" because it might erode the finished surface. In contrast, Maccani testified that the intended use of the Allen-Bradley electrical components did not include sawing or drilling into them. In fact, he testified that the components included predrilled holes so that the end user would not need to drill into them. He explained that the tolerances on the electrical components were extremely

precise, and that even a minute amount of sanding would interfere with the functioning of a part. "We specifically told people to keep their hands off. We have good designs and we didn't want them to be adapted in any way. We designed generally to close tolerances and any drilling or anything like that would . . . it would alter the performance of the device. And we even went as far as one of our big sales devices was that we had predrilled mounting holes in all of our devices so that you can take that and put it right on the panel. And the enclosures would have the holes predrilled in there so everything could just be slipped right into place. So you wouldn't have to drill holes or adapt at all."

Another controverted issue was whether asbestos fibers were released during the use of Allen-Bradley's components. Mr. Wells testified that sanding and cutting a "V" into the arc chutes caused "quite a bit of dust." Cohen testified that merely touching or handling a plastic part of an electrical component that contained asbestos would not expose the handler to asbestos fibers. However, in the process of cutting a "V" into the components, his "concern [was] that [asbestos-containing] material would come out." Maccani testified that the asbestos fibers in Allen-Bradley plastic parts were encapsulated, and that any dust from the parts was particulate in nature rather than asbestos fibers.

Appellants also maintain that no substantial evidence supports the verdict because it was uncontroverted that Allen-Bradley did not issue warnings about its product. Appellants identify Maccani's testimony that Allen-Bradley sold asbestos-containing products without any warning about asbestos "because we believed that that asbestos was not fibrous in nature, that asbestos was fully encapsulated by the polymers that were in the compounds." Failure to warn only results in liability, however, if there was a duty to warn. As the jury was instructed, "A manufacturer has a duty to provide an adequate warning to the consumer of a product of potential risks or side effects which may come from the foreseeable use of the product and which are known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge at the time of manufacture and distribution." The jury could have found based on the evidence that

cutting, drilling or sanding the Allen-Bradley electrical components in the manner to which Mr. Wells testified was not a foreseeable use of the product.

Here, there was conflicting testimony about what the ordinary and expected use of Allen-Bradley's products was and whether asbestos fibers were released during the ordinary and expected use of the products. Moreover, there was conflicting testimony regarding whether dust created as a result of sanding or abrading the components resulted in airborne asbestos fibers or merely "particulate matter" or dust. We will not reweigh this conflicting testimony, but conclude that there was substantial evidence on which the jury could base its verdict.

C. Motion for New Trial

Appellants argue that they were "deprived of any meaningful hearing on their new trial motion." The trial in this case was heard before Judge Alfred G. Chiantelli, who subsequently retired. The motion for new trial was assigned to Judge David L. Ballati. Judge Ballati indicated at the hearing on the motion for new trial that Judge Chiantelli was unavailable to hear the motion, and that he would allow the motion to be deemed denied by operation of law under Code of Civil Procedure section 660.[4] Appellants claim that the hearing before Judge Ballati and the denial of the motion by operation of law denied them a "meaningful hearing" of their motion.

Appellants first maintain that they were denied a "meaningful hearing" because Judge Chiantelli told the parties he would "come out of vacation" to hear the new trial motion, but then "refused to do so."[5] They argue that a new trial hearing before the same judge who presided at trial is "at the very heart of the statute."

Section 661 expressly contemplates that the trial judge may not be able to hear the motion for new trial. Section 661 provides in part as follows: "The motion for a new

---

[4] All further undesignated statutory references are to the Code of Civil Procedure.

[5] Appellants concede that they "acquired [no] additional rights by virtue of his promise to hold the hearing." They also indicate they are not asserting misconduct on the part of Judge Chiantelli.

trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge of the same court." (§ 661.) "Inability" of the trial judge to hear a motion for new trial may include "death or the happening of an equally significant event in life affecting [the judge's] continued performance of his judicial duties, such as expiration of his term of office, resignation or retirement from service, disqualification, as well as some physical or mental disorder." (*Telefilm, Inc. v. Superior Court* (1949) 33 Cal.2d 289, 292.)

Here, Judge Ballati continued the hearing on the motion for new trial for one day in order to determine if Judge Chiantelli could hear the motion. At the continued hearing, Judge Ballati indicated, "Yesterday we were here to discuss [appellants'] Motion for New Trial . . . . And the issue that surfaced was whether or not Judge Chiantelli, who was the trial judge, would be able to hear the . . . Motion for New Trial . . . . And Judge Chiantelli, to my knowledge, was unavailable, which is why this matter was assigned to me for hearing. I then was able to talk to Judge Chiantelli after we met yesterday. In fact, I spoke with him early this morning. And he said that he is not available to hear this matter. And so because of his unavailability, I will be hearing this matter." Appellants do not dispute that Judge Chiantelli retired following the trial. Contrary to appellants' claim, the hearing was conducted in accordance with the procedures set forth in section 661.

Appellants also claim that the hearing on their motion was not held within the statutory time period. Section 661 provides that if the new trial motion is heard by "a judge other than the trial judge [it] shall be argued orally or shall be submitted without oral argument, as the judge may direct, not later than ten (10) days before the expiration of the time within which the court has power to pass on the same." (§ 661.) Section 660 provides that "the power of the court to rule on a motion for a new trial shall expire 60 days from and after the mailing of notice of entry of judgment by the clerk of the court

. . . or . . . any party. . . . If such motion is not determined within said period of 60 days . . . the effect shall be a denial of the motion without further order of the court." (§ 660.)

Here, the clerk of court mailed notice of entry of judgment on August 27, 2002. The hearing before Judge Ballati was scheduled for October 23, 2002, less than 10 days before expiration of the 60-day time period. Nevertheless, despite the statutory language, the 10-day time period set forth in section 661 has not been considered mandatory. In *Pappadatos v. Superior Court* (1930) 209 Cal. 334, the court held that the 10-day provision in the statute was not mandatory, but "directory, intended only to direct a wise procedure for the disposition of such motions. . . . Inasmuch, therefore, as section 661 contains no penalty for the omission of this procedure and the motion was submitted and passed upon within said sixty-day period provided by law, we hold that the court below acted within its jurisdictional limits." (*Id*. at p. 335.)

Appellants next argue that the denial of their motion for new trial by operation of law deprived them of a "meaningful hearing." The grant or denial of a motion for new trial will not be reversed on appeal absent an abuse of discretion. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872; *Estate of Shepard* (1963) 221 Cal.App.2d 70, 75.) " 'This rule with respect to an abuse of discretion, applies with equal force, when the motion for new trial is automatically denied under the provisions of section 660 of the Code of Civil Procedure for failure to affirmatively pass upon the motion within sixty days after filing the notice of intention to move for a new trial. That section provides that the effect of a failure to pass upon the motion within the time allowed by law "shall be a denial of the motion." The discretion of the trial judge must be deemed to have been exercised in permitting the motion to be denied by lapse of time exactly the same as though that discretion were used in affirmatively passing on the motion.' . . ." (*Estate of Shepard*, *supra*, 221 Cal.App.2d at pp. 75-76.)

Here, at the hearing before Judge Ballati, appellants' counsel indicated to the court: "So I'm wondering if it wouldn't be more prudent to deny our motion, based on

your ability under [section] 661[6], to direct that it is not possible for the Court to take command of the evidence, and evaluate it, and weigh it as the thirteenth juror? I don't know how that will be any different than the reality we face if we go through you reading all the testimony that's available and hearing our presentation. . . . [¶] I just don't want to be in the Court of Appeal where I have a defendant arguing that the Court of Appeal should give great weight to the trial court's denial of the new trial motion where I'm having to really argue that that wouldn't be a fair characterization of the process and the circumstances we find ourselves in here. Because in the Court of Appeal, the Court of Appeal will have the full trial record; it will have the briefing; it will have the clerk's transcript; it will have an abundance of time to consider the arguments. And I don't see the prejudice in proceeding in such a way."

Though appellants now claim they were denied a "meaningful hearing" on their motion, it was appellants' counsel who requested that the court allow the motion to be denied by operation of law rather than rule on it, and indicated he saw no prejudice in proceeding in that way. We find no abuse of discretion.

IV.

DISPOSITION

The judgment is affirmed.

_____
Ruvolo, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.

---

[6] Counsel was apparently referring to section 660 rather than section 661.